Some Problems of Legal Ethics

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S THE law is a science which deals principally with ethical questions, so the ethical relations of its practitioners towards the courts, each other, and the public have always been regarded as of paramount importance. With this object in view, there have been not only many discussions of the broad subject of the lawyer's duties and obligations by those who have thus sought to discharge, in part at least, the duty which each of us owes to his profession, but various organized bodies of the Bar have sought to put into the form of rules and canons some sort of code upon the subject, to which the young lawyer might refer his doubtful questions.

It is, of course, obvious that any attempt to codify the rules governing the lawyers must be very inadequate. The simpler, well-recognized rules can, of course, be stated, and the general principles which should guide his conduct can be at least outlined. But the difficulty with rules intended only to cover the most apparent professional duties is that they may be taken, ignorantly or purposely, as containing the last word upon the whole subject of professional duties. I am reminded, in this connection, of the Tennessee lawyer who is a character in one of Charles Egbert Craddock's stories, whose conscience was fully expressed in the penal code of the state of Tennessee and whose estimate of sin was entirely in proportion to the penalties affixed by that code to various offenses. Manifestly any such view of a code of legal ethics is not to be encouraged.

It is also clear, upon consideration, that any statement of a general duty or rule of conduct cannot always be followed. The duties of our profession are too complicated, the circumstances with which we find ourselves confronted too involved and refined, to permit a simply stated rule to meet adequately all situations.

Take, for example, the Fifteenth Canon of the American Bar Association. Under the head of "How Far a Lawyer May Go in Supporting a Client's Cause," we find the following language in the third paragraph:

> In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense.

I do not mean to criticize at all the language of the canon. It is probably as fair a statement of the general rule as could be devised. But let us see, for a moment, whether it can be depended upon as of universal application.

The statute of limitations is a statute of repose, wisely intended to prevent the assertion of stale claims where years may have caused the memory to become inaccurate, and the evidence of the transaction may no longer be available. Since it had to apply to all cases, it could make no distinction between the disputed claim and the admitted claim.

Now assume that a client comes to you with an admission that he owes the claim, that he has secured indulgence and delay by appeals to the clemency of his creditor, such appeals always stopping short of such promise of payment as would toll the statute, and he has now succeeded in his purpose of having "the law pay his debt." It is not difficult to imagine details of this transaction that would present a picture so repulsive that no lawyer of conscience would identify himself with a client of such distorted ethical views. For, after all, the lawyer is the client when he appears for him in court and no reasoning can justify him in making his own a case which shocks his moral sense.

Let me illustrate further by a case which actually occurred in my professional experience a number of years ago. In the state in which I am a practitioner the rule used to be that a deed, absolute on its face, could be shown to be a mortgage by parol evidence which should be "clear, precise, and indubitable." Many cases went to the appellate court, in which the character of the evidence was discussed, sometimes held to be sufficient, sometimes insufficient. The legislature, in its wisdom, decided to make an end of this entire class of controversies and to that end passed an act that no deed, absolute on its face, could be shown to be a mortgage, unless there was executed and acknowledged with it a formal defeasance, which, to be valid, must be recorded within a certain number of days of its date. The purpose of the act is apparent and I do not mean to question its wisdom for the general end it had in view.

An old farmer had a fine, well-stocked farm, out of which, by constant industry, he made a good living for himself and his family. It came to pass that he needed some money, perhaps for a new barn or improved machinery. At all events he wished to borrow seven hundred dollars. He had absolutely no business experience, so he inquired of his neighbors how a man wanting to borrow money might go about it, and by them was referred to a mortgage broker. The mortgage broker proved quite accommodating, as he might well be, for the farm was worth many times the amount of the loan. He explained, however, to my farmer friend that he would not use the ordinary mortgage form, but would put the transaction in a much simpler shape. The farmer would make to him, the lender, a straight deed for his farm, for a nominal consideration, and the lender would give him back a paper, duly acknowledged, setting forth that the deed was really a pledge of the property for the debt and that upon

its payment, with interest at six per cent, the lender would reconvey the property by good and sufficient deed of conveyance. The transaction was so closed. It was all very simple. Reading over the terms of defeasance, the farmer saw the whole matter clearly set out. There was no possibility of a misunderstanding. So he peacefully put away the paper in a safe place and applied himself to the tillage of his farm. Before the debt was due, he found himself in funds to repay it and so betook himself to the mortgage broker, with the principal and interest of his debt, to get back his farm out of pledge. To his horror he was told that the farm now belonged absolutely to the broker, because the farmer had neglected the little formality of recording the defeasance within the time set by the statute and it was no longer worth the paper on which it was written. He had fallen into the trap which it was intended he should fall into.

It was a very frightened old man who came to me with this story. He was so dazed that it was with difficulty I could explain to him the toils in which he was involved. When he did understand his position, in spite of my assurances that the Supreme Court would make some new law to fit his case, he hurried off to the counsel for the mortgage broker and made his own settlement. I do not know what he had to pay as usury and attorney's fees to get back his farm. Perhaps he was wise to take the shortest way out of the difficulty. I have always believed that, in spite of prior decisions, the Supreme Court would have relieved against so obvious an iniquity. But aside from the legalities of the case, how would your conscience feel in being partaker in the spoils riven from an old, an ignorant, and an unsuspecting man? I can hear the answer before it is given—"Thy money perish with thee."

A somewhat similar situation sometimes occurs, not frequently, but often enough to attract attention. A man or men in a fiduciary relation towards an association or an estate will, by methods perhaps purporting to be legal, perhaps not even presenting the face of legality, appropriate the funds of the trust. When restitution is sought, the despoilers are found surrounded by legal talent who oppose their best efforts to the admitted claims of justice, seeking by every technical objection, by every finespun line of argument, to so obstruct the pursuit that the pursuers may be worn out, as it were, by a process of attrition, and the looters allowed to retain a not inconsiderable portion of their loot as the basis of compromise.

These are only some of the illustrations of what is meant by the "perversion of the law." I submit that more resentment has been caused by this species of professional action, where an evident wrong —an injustice—either committed in the past or sought to be committed in the future, is protected or furthered by the dry husk of the law, than by all the badly decided cases, which have been fairly

threshed out before the courts, that have appeared on the records since records began. No one asks of a lawyer that he shall be the *cutos morum* of his state or his community. The legislature is the final judge of the sound public policy of nation and state, and the local assemblies or councils of the matters of policy which the higher authority has committed to them. The lawyer may or may not approve of the policy represented by a particular Act of the Legislature. It is a matter of entire indifference what his mental attitude is towards the act in question. A lawyer is a minister of the law, not a creator of it. His very oath of office requires of him fidelity and obedience to the established law. What applies to an Act of the Legislature applies practically to a settled rule of policy adopted by the courts, although in the latter case he may feel free to call the attention of the courts to the wisdom or authority of the particular rule. Having then ascertained the rule of law applicable to his case, it is the business of the lawyer to see to what extent his facts come within it and his case is governed by it.

In all the myriad forms that legal questions take, such as the exact statement of the rule of law, the composition of disputes between conflicting authorities, the construction of the terms of a statute, the application of rule of law, once settled, to the facts of the case, the advocate acts for his client in the fullest sense of the word. He endeavors to put forward every argument and consideration for the winning of his case that his client could put forward if he had the professional training. It is altogether desirable that he should do this. It is out of the earnest contention of the Bar that the court can fairly determine the cause. If advocates were judges, each seeking the best and strongest form in which to state his adversary's case, the task of judicial determination would be much more difficult than it is at present. And, I take it, an advocate may present an argument which is not persuasive to his own mind, so long as he does it fairly; for our minds approach problems from different points of view, and no man can say that his conception of the case is the only one to be entertained. The strong, clean-fought battle upon both sides is just as much a necessary element of the right decision of the matter as is the impartial, fair, judicial mind which examines, selects, and rejects until it has demonstrated its conclusion.

In like manner with the facts of the case. An advocate has no right to prejudge these adversely to his client, any more than he is allowed to prejudge them favorably to his client. Our system has raised up a tribunal for the express purpose of determining disputed questions of fact, and for no other purpose. Every advocate has been surprised more than once by his misconception of the facts both for and against his client until they are fully winnowed out by the examination and cross-examination that make up our trial procedure. Therefore, unless he has some secret evidence of the falsity of his

client's story, and so long as he presents the evidence for his client fairly, it is his right and duty to permit the jury to determine where the truth lies. All this is a part of our system by which justice is obtained out of controversy.

Where, as I look at it, the line must be drawn, is where the lawyer is asked to use the law for a purpose entirely foreign to its object, a purpose which the legislature which made the law or the courts which laid down the rule would at once have rejected, had they perceived the proposed result, as one which they would have excluded from their term had they been able to so frame a general rule as to provide for the exception. The instances I have given above will perhaps illustrate my meaning. If I may state it simply, it would be something like this.

A lawyer may use all rules of law for the benefit of his client, to secure to him the results which the law has meant to give him; he may not pervert the rules of law to secure to his client results which he is perfectly aware that those rules never contemplated, and which results are so opposed to his moral sense that he would never, for a moment, think of claiming them himself. When brought face to face with results such as I have mentioned above, he cannot divest himself of the fact that he is his client's keeper.

There is another ethical field somewhat broader than that which we have been discussing, quite outside any canons of ethics, and dealing perhaps more with a lawyer's duty as a citizen than his strictly professional character.

The last quarter of a century has seen many changes in many fields of the law. The right of the workman to compensation for injury received as a part of the industrial operation of railroad or plant, the right of small business to compete on even terms with large business, the prohibition of unfair competition, have rewritten the law as it was known to the older lawyer. These results have been accomplished not by professional, but by popular thought and activity.

To find an illustration so far removed from the present field of reform activities as to permit of candid review, let us turn for a moment to the English land laws at a time when the religious houses of England were gradually but surely drawing into ownership the fertile acres of that little island. The tenants and farmers who toiled upon these acres were but the serfs of their masters. And the great grievance was that once a farmstead passed into the dead hand of the corporation, it never escaped. To remedy this evil the Parliament of England passed the Statutes of Mortmain. To prevent the will of the Parliament from being accomplished, the lawyers of England invented the "conveyance to the use." To countercheck the device, the Parliament passed the Statute of Uses. And so on through

many turnings the people of England pursued their quarry, and the lawyers of England fought repeated rear guard actions to save the quarry from pursuit. We need not enter into details. Are they not all charmingly set forth in the second book of Blackstone? And the author admiringly adds that the religious houses ever had for their counsel the best that were to be had in the realm.

Now that the smoke of battle has long since cleared away, and the pursuers and pursued have long since turned to their mother earth, is it too much to say that all men recognize that the Parliament was absolutely right and the men of our profession, who so astutely sought to hinder, delay and defeat its will, were absolutely wrong?

I had almost said at the close of this little story, *"nomine mutato, de te fabula narratur,"* but that would not be just or fair. I do not think it can fairly be said of the lawyers of to-day that, as a class, they have tried to hinder or delay. The most that can be said of us is that we have failed to originate much of what has been accomplished. The above illustration, however, does fairly show the ultra conservatism of the professional. And also it is not unlike the picture which you and I have seen repeated many times in the last few years, of an attorney general with naked sword brandished aloft, breaking his way through brushwood and thicket in pursuit of terrified trust directors, who are desperately being herded to safety or fancied safety by the rear guard of our profession.

"The old order changeth, giving place to new."

Let us try, as much as lies in us, to adapt ourselves to new conditions, to do what we can, in our individual small way, for the country's progress, and so be in a position not only to help forward, but to guide wisely when reform, as reform often does, needs check and restraint against injurious or destructive revolution.

No canons of ethics, no writer on professional duties, can ever hope to successfully define, cover, and solve the ethical questions which hang about our profession. The only safe guide which the younger man may adopt, and the older man may cultivate, is that simple voice of conscience that speaks always its own advice when difficulty arises, to take that course, to use those methods, which, were the conditions reversed, we could justly demand should be applied to us by our adversary.

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